Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

80-104

In the Supreme Court of the United States

OCTOBER TERM 1980

LULAC COUNCIL 11054 et al.,

Petitioner,

~~ROMEO BRADLEY, et al,~~

VS.

WILLIAM C. MILLIKEN, et al., and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Did the Court of Appeals erroneously affirm a denial of Intervention to Hispanic students who sought to protect Bilingual Education programs in a District undergoing desegregation?

PARTIES

LULAC COUNCIL 11054, LA SED, DANIEL and ELISA SAUCEDA by and through their next friend and parent ROSA SAUCEDA; JOEL and NOEL LEDESMA by and through their next friend and parent SOFIA LEDESMA,

Petitioners,

RONALD BRADLEY, RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCHE GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBER BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan on their own behalf and on behalf of their minor children, all on behalf of any persons similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH

v.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Department of Education and ex-officio Chairman of Michigan State Board of Education;

Respondents.

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LULAC Council 11054 et al. Proposed Intervenor-Plaintiffs Petition For A Writ Of Certiorari To Review The Opinion Of The United States Court Of Appeals For The Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court is unreported. It is found in the Appendix to this Petition at page 1. The Per Curiam order of the Sixth Circuit is likewise unreported. It is contained in the Appendix at page 6. It is this ruling

that the Petition is directed toward. An opinion by the same panel on the merits of the case is included in the Appendix at page ..... These rulings were rendered on April 14, 1980.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Did the Court of Appeals erroneously affirm a denial of Intervention to Hispanic students who sought to protect Bilingual Education programs in a District undergoing desegregation?

STATUTES AND RULES INVOLVED

Rule 24, Federal Rules of Civil Procedure, 42 U.S.C. 2000(d); 20 U.S.C. 1703(F).

STATEMENT OF THE CASE

This Court has twice ruled in this case. In *Milliken v. Bradley,* 418 U.S. 717 (1974) (*Milliken I*), this Court established standards for expanding a remedy beyond the boundaries of a given school system. In *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*), this Court affirmed a District Court order mandating certain educational programs incident to the desegregation remedy.

While numerous Hearings, Trials and Appellate rulings have occurred during the ten (10) years of this litigation, a proper starting point for understanding this appeal is the last ruling of the Court of Appeals precedent to the April 14 rulings. In that ruling, *Bradley v. Milliken,* 540 F.2d 229 (6th Cir. 1976) aff'd 433 U.S. 267 (1977), the Court disapproved the total omission of three predominantly Black regions from a desegregation plan adopted

by the District Court. Although the Sixth Circuit remanded for reconsideration of this aspect of the District Court decree, it expressed its concern that little could be done given the ruling of this Court in *Milliken I,* 540 F.2d 229, 240.

In the Spring of 1978, Hearings pursuant to the remand occurred. At the termination of those Hearings on April 24, 1978, the Court expressed its belief that additional desegregation could be accomplished by utilizing approximately five (5) schools which had significant numbers of Hispanic students.[1] On that date the Court further expressed strong reservations about the need to continue bilingual education programs as desegregation occurred. Several excerpts from the transcript of that hearing highlight the Court's approach; the Court stated:

> If you are going to have all that bilingual, bicultural education down in Region 2 for Spanish, then you had better have it up here in Region 1 for black people and in Region 4 for black and white people and everything else. I hope you find the money someplace because it is wrong, and it is taking this District in the wrong direction once again. And I am not going to start that. I will nip that in the bud right now. (Transcript, April 28, 1978, p. 64.)

The Court concluded by observing that he had a draft memorandum opinion which:

> I am working on in this case that is going to disapprove the contained system for teaching bilingual bicultural education. I will not permit it in this District unless a higher Court tells me I must. On my authority, your own statistical data shows that it is resegregating

1. Each of these schools also had significant numbers of Black students. Webster School, the school that drew most of the attention of the Court has 38.6% Black students and their percentage is increasing.

> the entire system and that is the seed for resegregating every region in the District.
> (*Id.* 64-65)

On July 24, 1978, the Petitioners filed a Motion to Intervene. This Motion was filed in the name of two Hispanic organizations, five sets of parents and class composed of "all Hispanic school children who are eligible for bilingual programs in the Detroit Public Schools who may be affected by this Court's impending relief in such a manner as to be denied equal access to an equal educational opportunity". The request for relief was the protection of the right and interest of intervenors in all remedial actions taken by the Court.

On August 7 the Court issued its order. It ordered the School District to submit a further desegregation plan within fourteen (14) days which *inter alia* should "make provisions for bilingual bicultural programs . . .". The Court also disapproved the continued concentration of bilingual programs in Region 2. This ruling of the Court was stayed pending an Appeal which culminated in the April 14, 1980 rulings. On September 1, 1978, the District Court denied the Petitioner's Motion to Intervene.

SUMMARY OF ARGUMENTS

Reversal of the Court of Appeals ruling is of crucial importance to the interests of national origin minority children in Detroit and throughout the Country. If the rationales advanced for denying intervention are allowed to stand, then children will be effectively precluded from participation in the development of desegregation plans which just now are coming to grips with the need to reconcile bilingual education and desegregation.

The Detroit pattern is not unique. Most desegregation cases in this country are brought by Plaintiffs representing

a class of Black children. At the time that the District Court is ready to evaluate desegregation plans, it becomes apparent that special thought and expertise is required to protect the educational programs needed to assure equal educational opportunity for language minority students. *Lau v. Nichols,* 414 U.S. 563 (1974). As this Court is well aware the time between the filing of the complaint and the call for remedial plans is frequently a number of years. If, as the Circuit Court ruled, non-participation during the time-consuming "violation" stage precludes intervention under the "Timeliness" doctrine, language minority children will rarely be able to participate in protecting their rights to a linguistically appropriate education.

The second rationale advanced for denial of Intervention is likewise faulty and, if upheld, can serve as a basis for denial in virtually all cases. The Court ruled that because the District put on the stand their bilingual director to justify their contention that no further busing should be ordered, they (the Detroit School District) adequately represents the interests of language minority children. While Petitioners in this case have no reason to question the sincerity of the School District, it is manifest that they, as all other Districts, have conflicting masters and objectives in implementing a desegregation plan. Such conflicts create the real potential for conflicts of interest which pose serious dangers to the legal rights of language minority children.

This decision further deserves review for it conflicts with decisions in other Circuits. As previously stated, the question of Hispanic participation at the remedial stages of a desegregation case has become increasingly important. Intervention for purposes of protection of linguistically appropriate programs has been granted in Boston, *Morgan v. Kerrigan,* 401 F.Supp. 216, 242, 252 (D. Mass. 1975), *aff'd*

530 F.2d 401 (1st Cir. 1976) *cert. denied* 426 U.S. 935, and in Wilmington, Del, *Evans v. Buchanan,* 416 F. Supp. 328, 360 (D. Del. 1976) *aff'd* in relevant part 555 F.2d 373, 381 (3rd Cir. 1977) Appeal dismissed 429 U.S. 973, Reh. Den. 434 U.S. 944. Cf. *Ross v Eckles,* 468 F 2d 651 (5th Cir. 1972).

ARGUMENT

I. Petitioners' Motion To Intervene Was Timely

A. INTRODUCTION

Both Rule 24(a) and 24(b) require that motions for intervention be made upon timely application. While timeliness is a matter to be left to sound judicial discretion, it must be construed broadly in the context of the liberal construction accorded the Federal Rules of Civil Procedure. Such liberal construction is particularly appropriate in light of the underlying purpose of the intervention rules themselves—that of protecting the rights of unrepresented third parties; as many courts have noted:

> Timeliness is not a word for exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interests of justice. *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065, 1074 (5th Cir. 1970). See also *Hodgson v. United Mine Workers of America,* 473 F2d 118 (D.C. Cir. 1972).

B. PETITIONERS DID NOT UNDULY DELAY IN THE FILING OF THE MOTION

While this litigation has been in progress since 1970, the timing of Petitioners' motion was not the result of undue and unreasonable delay. The posture of the litigation at the time of the Motion to Intervene raised interests and concerns to the Latino community which has not previously arisen. The need for intervention by LULAC Council No.

11054, LA SED and Latino parents and students at that time was triggered in a large part by the concerns expressed by the Court in the April, 1978 hearing regarding the placement of Latino children in bilingual programs in Region 2 schools and the effect of those programs on District-wide desegregation. This was the first time in the history of this protracted litigation that the placement of the minor Petitioners in bilingual programs was directly at issue.

Petitioners did not unduly delay between the time their interests were directly brought before the court in April and the filing of their motion in July. They attempted to come before the court before any order requiring further remedial action was entered and were prepared to participate in any remedial planning.

Moreover, even if intervenors are considered to have delayed in filing their motion, the mere passage of time, in the absence of prejudicial effect on the original parties, does not constitute grounds for denial of intervention. As stated by one court:

> In the present case McDonald seems to assume that the requirement of timeliness is a tool of retribution which can be used to punish a would-be intervenor for allowing time to pass before moving to intervene. We cannot agree with such a view. We think it is correct to say that since "the privilege of intervention stems from a desire to protect the rights of underrepresented third parties, it becomes apparent that the timely application requirement under Rule 24 was not intended to punish an intervenor for not acting promptly but rather was designed to insure the original parties should not be prejudiced by the intervenor's failure to apply sooner." Note, *The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure,* 37 VA.L. REV.

863, 867 (1951). Accordingly, it has been the traditional attitude of the federal courts to allow intervention "where no one would be hurt and greater justice would be attained." *Id.* at 868. *McDonald v. E.J. Lavino, Co., supra,* 430 F.2d at 1074.

C. INTERVENTION WOULD NOT PREJUDICE THE ORIGINAL PARTIES TO THIS LAWSUIT

The existing parties to this action would not be prejudiced by granting of the motion to intervene. Despite the fears expressed by the District Court that "if [it] were to allow intervention, the parties would have to relitigate issues that have already been extensively litigated at great expense", Petitioners did not seek to and do not intend to relitigate any issue previously adjudicated. They merely seek to protect the rights of limited English speaking Latino children in any future remedial action.

Petitioners' desire to protect their interest in bilingual education does not require the wholesale exclusion of Latino or Spanish-surnamed students from a pupil reassignment remedy, as the District Judge apparently feared. At the outset, Petitioners do not seek to represent all Spanish-surnamed students, but only those students whose limited English speaking ability and special linguistic needs make bilingual education appropriate and necessary.

Additionally, Petitioners do not claim that the interests of even these students must be served by their exclusion from a pupil reassignment plan. Rather, we claim that these students' needs must be taken into account in the event that they are to be reassigned. Petitioners' sole desire in this litigation is to assist the parties and the Court in formulating future remedial plans in which the concepts of bilingual

education and desegregation are compatibly resolved.[2] We do not argue, as the District Judge believed, that certain students should not have to participate in the desegregation remedy.

Under these circumstances, Petitioners' participation in the proceedings would be limited to hearings yet to come at the time of their motion and to issues yet to be resolved. There would be no need to relitigate the issue of liability nor any remedial action already taken in this action. Thus, the existing parties would in no way be prejudiced.

Absent prejudice to existing parties, both mandatory and permissive intervention, with appropriate limitation where necessary, have been granted at virtually all stages of judicial proceedings. Thus, the case law is replete with grants of intervention at post-trial, post-judgment, post-consent decree, and post-appeal stages. See, *Hodgson v. United Mine Workers of America,* 473 F.2d 118 (D.C. Cir. 1972) (application timely seven years after trial); *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065 (5th Cir. 1970) (application timely even though filed after entry of judgment); *Kozak v. Wells,*

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2. To this end Petitioners presented the District Court with examples of other litigation in which courts successfully struck a balance between bilingual education and desegregation in remedial pupil reassignment plans. (A. 75-76 and A. 160). The Boston desegregation case, *Morgan v. Kerrigan,* 401 F. Supp. 216 (D. Mass. 1975), *aff'd* 523 F.2d 917 (1st Cir. 1975) was the first to address the issue. The Court resolved the problem by first determining the percentage of minority and non-minority students who should be in each school. For example, a school might be required to have a 40% composition of minority students. The Court then determined that three consecutive bilingual classes was the minimal number necessary for effective programming. Three classes are comprised of sixty students. If those sixty students brought the minority percentage of the school to 20%, then there was space available for 20% black students and 60% Anglo. To effectuate this process, it was necessary first to identify limited English-speaking students; secondly, to determine minimally acceptable numbers for programming; and thirdly, to assign these students first and then to fill in other students. 401 F.Supp. 216, 242, 252.

278 F.2d 104 (8th Cir. 1960) (application timely after one year); *Innis v. Sperden & Co. v. Food Mach. Corp.*, 2 F.R.D. 261 (application timely after four years); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967) (application timely after six months).

Moreover, school desegregation cases such as the instant case, have long been recognized as deserving of judicial solicitude, and protected from ordinary procedural technicalities whenever possible. *See, e.g., United States v. Georgia*, 428 F.2d 377, 378 n.1 (5th Cir. 1970). The cases go overwhelmingly in favor of holding an intervention timely when not intended to impede desegregation.[3] *See, e.g., Pate v. Dade County School Board*, 303 F.Supp. 1068 (S.D. Fla. 1969) (intervention allowed to re-open school desegregation suit nine years after original court decree); *Keyes v. School District*, 380 F.Supp. 673, 694 (D. Col. 1974) (intervention by Mexican Americans allowed eight years after original filing, and following numerous court decrees, including an appeal to the Tenth Circuit and this Court); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 896 (5th Cir. 1966) (intervention timely after school board submitted plan in compliance with court decree); *cf. Robinson v. Shelby County Board of Education*, 330 F.Supp. 837 (W.D. Tenn. 1971) (dicta) (intervention would have been

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3. Appellants do not seek to impede desegregation in the instant case, but only to avoid random dispersal of students and teachers in bilingual programs with the subsequent destruction of such programs. They seek only to assist the court in formulating a reassignment plan which would allow the programs to continue as constituted or to be reconstituted effectively in another, possibly more integrated setting (A. 66-77). Thus, they are not in the same category as the proposed intervenors in *Robinson v. Shelby County Board of Education*, 330 F.Supp. 837 (W.D. Tenn. 1971) or *Hatton v. County Board of Education*, 422 F.2d 457 (6th Cir. 1970) relied on by the District Judge in denying their motion.

timely after two district court and one appellate court decisions); *Atkins v. Board of Education,* 418 F.2d 784 (4th Cir. 1969) (intervention timely where delay due to lack of funds).

Since most school desegregation cases involve relief of an injunctive nature which must prove its efficacy over a period of time, the timeliness requirement for intervention in these cases must be one of *substantive* timeliness. As was stated by the Tenth Circuit in a *per curiam* opinion:

> ... [P]roceedings of this nature (school desegregation) which continue over such an extended period of time are unique in respect to the timing of the arrival and departure of parties. In our opinion, intervention and withdrawal should be freely granted so long as it does not seriously interfere with the actual hearings.

Dowell v. Board of Education of Oklahoma City Public Schools, 420 F.2d 865, 868 (10th Cir. 1970). Thus, timeliness should not be perfunctorily rejected due to time elapsed, but is to be guided by the established rule that "[T]imeliness is to be determined from all the circumstances." *NAACP v. New York,* 413 U.S. 345, 366 (1973).

Under these standards, Petitioners' Motion to Intervene was timely. If granted, the intervention would not have interferred with past developments in the case and would have had an impact only on future remedial hearings.

II. Intervenors Are Entitled To Intervention of Right Pursuant To Rule 24(a)(2) of the Federal Rules of Civil Procedure

Rule 24(a)(2) of the F.R.Civ.P. provides:

> (a) *Intervention of Right.* Upon timely application, anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest,

unless the applicant's interest is adequately represented by existing parties.

Thus, the Rule sets forth three requirements for intervention of right: (1) substantial interest; (2) possible impairment of the interest; and (3) inadequate representation —all of which were and are present in this case.

A. PETITIONERS HAVE A SUBSTANTIAL INTEREST IN THE OUTCOME OF THE LITIGATION BELOW

While the "interest" necessary to satisfy the requirements of Rule 24(a)(2) is not susceptible to precise definition, courts generally have agreed that a sufficient interest is shown where a prospective intervenor has demonstrated a meaningful stake in the outcome of an action. This liberal interpretation is consonant with the broad intent of the Federal Rules to assure all interested parties their day in court, and to dispose of lawsuits" . . . by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp,* 385 F.2d 694, 700 (D.C. Cir. 1967).

Intervention of right is repeatedly granted to commercial interests concerned with the potential loss of their profits. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 368 U.S. 129 (1967) (a gas purchaser guarding against a competitive disadvantage by its supplier as the result of an antitrust suit); *Atlantis Development Corp. v. United States,* 379 F.2d 818 (5th Cir. 1967) (a development corporation seeking to assert its ownership over a coral reef as against the United States and two other companies) *Nuesse v. Camp, supra,* 385 F.2d 694 (D.C. Cir. 1967) (a state banking commissioner in an action brought by a state bank against the United States Comptroller of Currency seeking to enjoin the authorization of a particular national bank).

In this case, Petitioners seek to protect a more vital and substantial interest: the right of limited English speaking children to an equal educational opportunity. In *Lau v. Nichols,* 414 U.S. 563 (1974) this Court upheld the authority of the Department of Health, Education and Welfare (HEW) to require School Districts to take affirmative steps to overcome the English language handicaps of national origin minority children. Since that time Congress has passed legislation embodying and expanding this obligation (20 U.S.C. 1703(F)); HEW has issued clarifying guidelines requiring that elementary school students be taught in a language they understand while learning English[4], and many states have passed Bilingual Education legislation.[5] While each of these pedogogical and legal initiatives can be accommodated in a desegregation plan, conflict will necessarily occur if expertise and thought are not brought to bear on the issue. For example, the dispersal of limited English proficient students without consideration of their educational needs and legal rights can lead to the destruction of clusters which are needed to provide administratively viable programs. These interests have been protected where intervention has been granted. *Morgan v. Kerrigan, supra; Evans v. Buchanan, supra; Arthur v. Nyquist,* 1972-325 (W.D. NY July 9, 1976). Thus Petitioners' interest can and must be addressed in this and other desegregation litigation.

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4. "Task Force Findings Specifying Remedies Available For Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*", Summer, 1975.

5. As of June 1976, 23 states had bilingual education legislation or other special authorization for the teaching of limited English proficient students. "State Education Agencies and Language Minority Student", National Center For Education Statistics (1978). It is believed that this number has substantially increased in the past four (4) years.

B. PETITIONERS' INTERESTS WILL BE IMPAIRED UNLESS INTERVENTION IS GRANTED

Although pupil reassignment to achieve desegregation does not necessarily spell the destruction of bilingual programs, random dispersal of students and teachers in Detroit's programs could cause their demise. At the time of Petitioners' motion, no one was addressing how bilingual programs could be preserved in the context of desegregation orders. Unless Petitioners are allowed to participate in future remedial hearings, there is no guarantee that anyone will address this crucial issue.

The need to cluster students in order to achieve the fundamental objectives of bilingual-bicultural education is inescapable. The Office of Education has recently recommended that legislation designed to deal with the more general problem of discrimination be modified to accomodate the desperate need for ethnically identifiable groupings in bilingual programs.[6] The Massachusetts Bureau of Bilingual Education, the state agency, has found the failure to cluster students the single most debilitating feature of the Boston program.[7] The Comptroller General's Report to Congress concludes that concentration of students is essential.[8] The Bilingual Education Act (20 U.S.C. 880(b)) stipulates that age-grouping must be priority. In fact, the requirement in the Michigan law which mandates bilingual programing when the District has 20 or more students of a given language classification is an implicit acknowledgment of the

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6. U.S. Commissioner of Education. First Report to the President and the Congress. *The Condition of Bilingual Education in the Nation.* HEW Publ. #(OE) 77-01704 (Nov. 1976), p. 101.

7. Mass. Bureau of Transitional Bilingual Education. *Boston Review Report.* March, 1976. p. 3.

8. Comptroller General of the United States. *Report to the Congress. Bilingual Education: An Unmet Need,* Gov't Printing Office, Washington, D.C., May 19, 1976.

administrative and financial difficulties of providing for a few widely dispersed children.

Despite the need to cluster students for bilingual education to ensure a sufficient number for three or four consecutive classes in a given school and the need to place the teachers where the students are, the Detroit School Board's first plan pursuant to the August 7 order did not address these issues. It merely provided that children be moved from schools in Region 2 to schools in Region 1.

The plan did not provide for identification of limited English speaking ability or for concentration of these children in clusters adequate to pursue needed educational programs. It thus contained the seeds for destruction of existing programs without the mechanism for creating new programs. If children are dispersed randomly, there are unlikely to be sufficient clusters for conducting quality programs or sufficient numbers of qualified teachers to serve the needs of individual children scattered throughout the system.

If existing bilingual programs are disbanded and not replaced, the educational careers of Petitioners will be irreparably damaged and they will be deprived, at least for a time, of their right to bilingual instruction. Further, it may take years to reconstitute adequate programs.

C. PETITIONERS' INTERESTS AND THE INTERESTS OF THOSE THEY REPRESENT WILL NOT BE ADEQUATELY REPRESENTED UNLESS INTERVENTION IS GRANTED

Rule 24(a)(2) mandates that prospective intervenors, who otherwise meet its requirements, be granted intervention of right "unless their asserted interests are adequately represented by other parties".[9] The clear language of the

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9. Prior to the 1966 Amendment to the Rule, it required an affirmative showing that the existing representation of the prospective intervenor's interest "is or may be adequate".

Rule thus thrusts the burden on those opposing intervention to affirmatively demonstrate the adequacy of representation. This provision, like the other provisions of Rule 24, is to be construed liberally to permit intervention. *Nuesse v. Camp, supra,* 385 F.2d at 702. This Court has held that this requirement for intervention is satisfied:

> . . . if the applicant shows that representation of his interest *may be* inadequate, *and the burden of making that showing should be treated as minimal.* (emphasis supplied)
>
> *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 (1972).

The Black plaintiffs who are the original plaintiffs in this action do not adequately represent Petitioners' interests in securing equal educational opportunity for limited English speaking Latino children. While the District Judge erroneously believed that Petitioners, by their Motion to Intervene sought to exempt the Spanish-speaking from desegregation efforts, he correctly perceived that the plaintiffs did not represent Spanish-speaking interests. In the Memorandum and Order denying Petitioners' motion, he stated:

> Plaintiffs' only goal is to pursue their constitutional right to a unitary school system, and not to continue the concentration of bilingual programs in Region 2. The intervenors, on the other hand, seek a statutory right to bilingual programs. (A. 165)

The District Judge erroneously ruled and the Circuit Court affirmed, however, that the Detroit School Board adequately represented Petitioners' interests. This finding was based on the fact that the Detroit District had made a presentation concerning its bilingual programs to the Court and had opposed the Court's idea to disperse the

programs located in Region 2. The Court was of the impression that "the proposed intervenors could not have presented better evidence on their behalf", and that intervenors could not possibly match the District's expertise in bilingual education.

While Petitioners do not dispute that the District is conducting bilingual educational programs in Region 2, that the District's director of bilingual education can describe these programs, and that the District would prefer that the programs remain in Region 2, these factors do not in themselves indicate the highest possible degree of expertise. Neither do they necessarily indicate identity of interest and adequacy of representation. For example, after the August 7 order indicated that students must be reassigned from Region 2 to Region 1, it was Petitioners, not the District, who provided the Court with examples of pupil reassignment orders compatibly dealing with the concepts of bilingual education and desegregation.

While the school district has not affirmatively opposed the position taken by appellants and in fact agrees in some measure with their position, it does not adequately represent their interests within the meaning of Rule 24. The Board of School Directors has a potential conflict of interest in representing the school community at large and the particular interests of limited English speaking children.

One example of the type of conflict that can arise is reflected in the instant litigation. The School District has taken the position that the desegregation of Hispanic and Black students is counterproductive. This has led them, at various junctures, to gloss over the difference between Hispanic limited English speaking students and Hispanic students not in need of bilingual programming. In part,

these efforts triggered the District Court's antagonism toward bilingual education which led to the necessity of the intervention.

In a somewhat analogous situation, this Court held that an individual had a right to intervene in a lawsuit brought by the government to protect that individual's rights. *Trbovich v. United Mine Workers, supra.* There, the Secretary of Labor pursuant to his powers under the Labor Management Reporting and Disclosure Act sued to set aside certain union elections. A union member had unsuccessfully sought to intervene in that action.

This Court recognized that the Secretary had two distinct duties: one, to act as the "lawyer" of the individual union members to enforce their rights; and two, to protect the public interest in assuring democratic unions.

> Both functions are important, and they may not always dictate precisely the same approach to the conduct of litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union members may have a valid complaint about the performance of "his lawyer". Such a complaint . . . should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2). *Id.* at 538-539.

Similar potential conflicts exist in the instant situation. The Circuit Court failed to consider this fact, and thus misapplied the law.

CONCLUSION

The Circuit Court found that Petitioners' interests were "legitimate and substantial", yet it denied our motion to intervene. Its ruling, allowed to stand, will affect not only the language minority children in Detroit but will set precedent which could deny participation by language minority children throughout the Country in formulating orders

which are essential to their receipt of equal educational opportunity. Because the Circuit Court ruling is bad policy and founded on a misapplication of the law, it should be reversed. This Petition for Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Attorneys for Petitioners

Dated: July 21, 1980.

Appendix

United States District Court
Eastern District of Michigan
Southern Division

September 1, 1978

CIVIL ACTION

No. 35257

RONALD BRADLEY, et al.,
Plaintiffs,

and

LULAC Council No. 11054,
a Non-Profit Corporation, et al,
Plaintiffs-Intervenors,

vs.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,
Defendants.

MEMORANDUM AND ORDER

LULAC Council No. 11054 and the other named intervernors have filed a "Proposed Complaint in Intervention" and a separate "Motion To Intervene As Parties Plaintiff." These proposed intervenors are individual children and organizations whose members include parents of Spanish-surnamed children participating in bilingual programs in the Detroit Public Schools. They seek intervention "to insure that the Bilingual Education programs they are entitled to receive do not suffer as a result of the implementation of a remedial plan in Region 2 or elsewhere . . . ." Complaint ¶ 3.

In their motion to intervene, the proposed intervenors contend that they are entitled to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a). They argue that

they, and the separate class they seek to represent, have a substantial interest in any remedial plan adopted by the court which includes Region 2, where they and a majority of their class live; that they have unique educational needs which require an expertise that existing plaintiffs do not have; and that only they can protect the current program for bilingual education in Region 2. Alternatively, the proposed intervenors seek permissive intervention, pursuant to Fed. R. Civ. P. 24(b).

Only the defendant Detroit Board and the State defendants filed a response to the motion to intervene. The defendant Detroit Board does not take a definitive position with respect to the motion, but they reserved the right to appear and argue at any future hearing. The State defendants oppose intervention, arguing that the interest of Spanish-surnamed students in bilingual programs is now adequately represented by the plaintiffs. The State defendants further argue that the petition is untimely since it was filed more than seven years after this action was commenced and three years after this court's remedial decree. The moving parties did not request a hearing, and we are now prepared to rule on the merits of their motion to intervene.
See Local Rule IX(j).

We cannot agree with the State defendants that the interests of the proposed intervenors are adequately represented by the plaintiffs. As we understand the proposed complaint for intervention, the movants seek to exclude Region 2 from any pupil reassignment plan because, in their view, the bilingual classes they attend would otherwise be detrimentally affected. Plaintiffs, on the other hand, object to restricting bilingual programs to one region because it provides neighborhood schools for one ethnic group to the exclusion of all others. Therefore, the plaintiffs did not and

cannot represent the interests of the proposed intervenors. Plaintiffs' only goal is to pursue their constitutional right to a unitary school system, and not to continue the concentration of bilingual programs in Region 2. The intervenors, on the other hand, seek a statutory right to bilingual programs.

We do agree with the State defendants, however, that this motion is untimely. LULAC did not apply for intervention until long after the evidentiary hearings were over and our opinion was prepared for filing. In that opinion we disapproved of the Board's wholesale exclusion of Spanish-surnamed students from the pupil reassignment remedy. We have already held that:

> This case began as and remains a racial desegregation case, and for school assignment purposes Spanish-surnamed students cannot be treated differently than other white students. Bilingual education is not a justification for treating one ethnic group in isolation nor is it a substitution for desegregation. Opinion of August 7, 1978, at 24 (citation omitted).

In any event, the defendant Detroit Board has more than adequately protected the interests of the proposed intervenors. At the latest hearings, the Detroit Board called as an expert witness Mr. Felix Valbuena, the Director of Bilingual, Bicultural Education for the Detroit Public Schools. Mr. Valbuena made a careful presentation of the bilingual program in the city and explained the need to preserve those programs. The Detroit Board vigorously opposed every suggestion that would disturb current bilingual programs in Region 2. *See* Opinion, August 17, 1978 at 23-24. We are persuaded that the proposed intervenors could not have presented any better evidence in their own behalf.

In *Robinson v. Shelby County Board of Education,* 330 F. Supp. 837 (W.D. Tenn. 1971), the court refused to allow white pupils and parents to intervene in order to challenge an order clustering a white school with a black school. The court there also indicated that the interests of the proposed intervenors were adequately protected by the defendant Board of Education. *Id.* at 849. The instant case is very similar in that here certain students are really arguing that they should not have to participate in the desegregation remedy. *See Hatton v. County Board of Education,* 422 F.2d 457, 461 (6th Cir. 1970); *cf. Penick v. Columbus Education Association,* 574 F.2d 889 (6th Cir. 1978).

In addition, we decline to allow the proposed intervenors to intervene under Fed. R. Civ. P. 24(b). The motion to intervene is simply much too late. If the court were to allow intervention, the parties would have to relitigate issues that have already been extensively litigated at great expense. *See Penick v. Columbus Education Association,* 574 F.2d 889 (6th Cir. 1978). Moreover, the intervenors could not possibly match the expertise of the Detroit Board in Bilingual/Bicultural Education. Since the Detroit Board and the intervenors have identical goals, no useful purpose could be served by granting intervention pursuant to Rule 24(b).

NOW, THEREFORE, IT IS ORDERED that the motion to intervene be, and hereby, is DENIED.

.....

ROBERT E. DEMASCIO
United States District Judge

Dated: September 1, 1978

PURSUANT TO RULE 77(d), FED. R. CIV. P. COPIES HAVE BEEN MAILED TO THE FOLLOWING:

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.....

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.....

.....

Louis R. Lucas, Esq., Thomas Atkins, Esq.
George T. Roumell, Esq.
George L. McCargar, Esq.
Theodore Sachs, Esq. ?????
ON September 1, 1978.

Sherry Stamps

.....

DEPUTY COURT CLERK

Appeal on old P. App. 47 Follows—

Appeal from the United States District Court
for the Eastern District of Michigan.

RONALD BRADLEY, et al.,
Plaintiffs,
LULAC COUNCIL No. 11054, et al.,
Proposed Plaintiffs Intervenors-Appellants,
v.
WILLIAM G. MILLIKEN, et al., and BOARD OF EDUCATION
of the School District of the City of Detroit, et al.,
Defendants-Appellees.

Decided and Filed April 14, 1980.

Before: EDWARDS, Chief Judge, and PHILLIPS and PECK, Senior Circuit Judges.

PER CURIAM. LULAC Council No. 11054, et al. appeal from the district court's decision denying their application to intervene in the remedial phase of the Detroit school desegregation case. We affirm the district court's decision, but direct that appellants be permitted to intervene for the limited purpose of presenting evidence on a question not previously litigated in the district court.

Appellants sought to intervene in *Bradley v. Milliken,* Civ. No. 35257 (E.D. Mich.), in order to protect the interest of Detroit's Hispanic students in receiving bilingual education. That interest, appellants felt, was imperiled by the district court's order that some white students in Detroit's Administrative Region 2 be reassigned to desegregate schools in the city's all-black inner city. Most of Detroit's Hispanic students live in Region 2, and all of the system's Spanish-bilingual programs are located there. Appellants are concerned that indiscriminate reassignment of Hispanic

students to inner-city schools will produce shortages of Spanish-bilingual teachers and resource materials, interfere with established pilot programs, and generally impair the district's ability to meet the educational needs of Hispanic students. Accordingly, they sought to participate as parties in the development of a pupil-reassignment plan that would be sensitive to their concerns.

The district court, in an opinion reported at 460 F.Supp. 320 (E.D. Mich. 1978), denied appellants' application to intervene on the ground that it was untimely. The court understood appellants to argue that Hispanic students should be excluded entirely from the pupil-reassignment plan. However, the court had already rejected the Board's argument for excluding Hispanos; it thought allowing appellants to intervene would force relitigation of that issue. Furthermore, the court felt the appellants' interest was already represented by the Detroit Board, whose expertise and resources the appellants could not match. Accordingly, the court held appellants had no right to intervene and declined to allow permissive intervention.

We agree with the district court that appellants have no right to intervene. Even accepting appellants' argument that they do not seek to exempt Hispanic students from reassignment but merely to ensure that reassignments are made with students' bilingual-educational needs in mind, we think appellants' interest is adequately represented by the Detroit Board. Dr. Felix Valbuena, the Director of Bilingual Education for the Detroit school system, cautioned the court that reassigning Hispanic students out of Region 2 schools, let alone doing so indiscriminately, would jeopardize the district's ability to provide quality bilingual education as required by law. Recognizing that danger, yet faced with this court's mandate to desegregate inner-city

schools, the district court ordered the Detroit Board to develop a reassignment plan that would "make provisions for bilingual/bicultural programs" and to "create new programs [where necessary] to maintain the current level of bilingual/bicultural offerings." We have every reason to believe the Board has and will continue to observe the court's order. Given the Board's demonstrated concern for preserving its bilingual programs, we think the appellants' interest already is adequately represented. Accordingly, we affirm the district court's decision that appellants are not entitled to intervene of right.

Nor did the district court abuse its discretion by denying permissive intervention in the pupil-reassignment proceedings. This case is already ten years old. Permitting the appellants to participate as parties in the development of a supplemental reassignment plan would delay further these already protracted remedial proceedings without producing any countervailing benefit.

Appellants can protect their interest, which we recognize is legitimate and substantial, by petitioning the district court to allow them to speak as *amici curiae* on behalf of the Spanish-speaking children of Detroit in future remand proceedings. Correspondingly, we suggest the court encourage and consider such *amicus* views in evaluating any reassignments of Hispanic students.

Despite our affirmance of the district court's ruling, we think appellants must be permitted to intervene for the limited purpose of presenting evidence on the question whether, historically, the defendants have practiced de jure segregation of Hispanos. That issue, not previously litigated, was raised by the Board's argument in *Bradley v. Milliken,* case nos. 78-1597, 79-1005, that Hispanos cannot be treated as white for school desegregation purposes. For

the reasons stated in Part IV of our opinion in that case, — F.2d at —, we think representatives of Detroit's Hispanic community must be allowed to participate as intervenors in the remand hearing on the limited issue of whether or not the Detroit Board has been guilty of de jure segregation of Hispanos. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 197-98 (1973); *United States v. Midland Independent School District*, 519 F.2d 60, 63-64 (5th Cir. 1975), *cert. denied*, 424 U.S. 910 (1976); *Tasby v. Estes*, 517 F.2d 92, 106-07 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975). Appellants may participate on other issues only if the district court permits them to do so as *amici*.

The case is remanded to the district court for further action consistent with this opinion. No costs are taxed. Each party will bear its own costs on this appeal.

Nos. 78-1597 and 79-1005

United States Court of Appeals
For the Sixth Circuit

APPEAL from the United States District court for the Eastern District of Michigan.

RONALD BRADLEY, ET AL.,

Plaintiffs-Appellees,

v.

WILLIAM G. MILLIKEN, GOVERNOR, ET AL.,

Defendants-Appellees,

and

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, ET AL.,

Defendants-Appellants.

Decided and Filed April 14, 1980.

Before EDWARDS, Chief Judge, and PHILLIPS and PECK, Senior Circuit Judges.

PHILLIPS, Senior Circuit Judge. On July 25, 1974, the Supreme Court remanded this case to the district court for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." *Milliken v. Bradley,* 418 U.S. 717, 753 (1974) (*Milliken* I). Nearly six years have elapsed since that remand, and almost ten years since this litigation began, yet we are unable to hold on the record before us that de jure segregation has been elimi-

nated from the Detroit school system. We conclude that we must send the case back to the district court for further proceedings.

The present appeal presents four questions for decision: (1) Did the district court err in holding that population and demographic changes in Detroit have obliterated all traces and effects of past acts of discrimination by the Detroit School Board and the State of Michigan? Part II of this opinion rejects the ruling of the district court as contrary to the law of this case and clearly erroneous. (2) Was the district court correct in holding that the overwhelming percentage of black students in the Detroit school system precludes including in the pupil assignment plan any of the schools in the three inner-city regions of the school district? Part III of this opinion concludes the district court's holding was error, and outlines the standards to be applied by the district court when it reconsiders inner-city pupil reassignment on remand. (3) Was it error for the district court to order additional pupil reassignments between schools in Regions 1 and 2? Part IV of the opinion affirms in principle the propriety of additional pupil reassignments, but remands the case for a hearing on the question whether Hispanic students should be treated as white for desegregation purposes. (4) Did District Judge Robert E. DeMascio abuse his discretion in declining to recuse himself from the remand proceedings in this case? Part V finds no abuse of discretion, but suggests, in view of the bitter feelings that have developed, that the case be reassigned to another judge on remand from this court's decision on the present appeal.

I

This protracted litigation began in 1970. On April 7 of that year, the Detroit Board voluntarily adopted a modest plan to desegregate some of the Detroit high schools. The State legislature, however, blocked implementation of that plan by enacting § 12 of Act No. 48, Public Acts of 1970. A citizen-initiated recall election resulted in the replacement of the four Board members who had favored the April 7 plan, and the reconstituted Board rescinded the plan.

The plaintiffs filed this suit on August 18, 1970, alleging that § 12 of Act No. 48 was unconstitutional and praying for a preliminary injunction requiring the Board to implement the April 7 plan. The late District Judge Stephen J. Roth denied plaintiffs' application for a preliminary injunction and they appealed. This court held § 12 of Act No. 48 unconstitutional, but affirmed the denial of a preliminary injunction and remanded for a trial on the merits. 433 F.2d 897 (6th Cir. 1970). On remand, Judge Roth again refused to grant a preliminary injunction, and this court affirmed, again directing a trial on the merits. 438 F.2d 945 (6th Cir. 1971).

The case was tried on the issue of segregation April 6, 1971, to July 22, 1971. On September 27, 1971, Judge Roth issued his ruling on the issue of segregation, finding both the State of Michigan and the Detroit Board[1] had com-

1. Nothing in this opinion is intended to reflect adversely upon the present Detroit Board of Education. Throughout the course of this often bitter litigation members of the present Board have cooperated with the district court's endeavor to remedy the unconstitutional de jure segregation created by acts and policies of their predecessors and former State officials. References in this opinion to the Board's discriminatory acts should be read as references to the actions of past, not present, Board members.

mitted "acts which have been causal factors in the segregated condition of the public schools in the City of Detroit," 338 F.Supp. 582, 592 (E.D. Mich. 1971).

Judge Roth determined that true desegregation could not be accomplished within the geographical limits of Detroit. Distributing the relatively small number of white students remaining in the district throughout the schools, he held, would render the entire system identifiably black. Accordingly, he ordered the defendants to submit metropolitan plans for desegregation. 345 F.Supp. 914 (E.D. Mich. 1972).

This court, sitting en banc, affirmed both the finding of de jure segregation and the propriety of an interdistrict remedy. 484 F.2d 215 (6th Cir. 1973).

The Supreme Court granted certiorari and reversed in part. The Court held the district court had no equitable power to include in its remedial decree any school district whose racial composition had not been shown to be the product of de jure segregation. The defendants did not, however, challenge the district court's finding of de jure segregation within the city of Detroit. Accordingly, the Court remanded the case for formulation of a Detroit-only remedial decree. 418 U.S. 717 (1974) (*Milliken* I).

Judge Roth had died shortly before the Supreme Court issued its opinion, and District Judge Robert E. DeMascio was assigned the difficult task of formulating a decree which would eliminate the effects of de jure segregation from the Detroit school system without transgressing the limits set by the Supreme Court in *Milliken* I. Judge DeMascio required the parties to submit desegregation plans, but rejected them as unsatisfactory. His August 15, 1975 opinion, reported at 402 F.Supp. 1096 (E.D. Mich. 1975), established guidelines to be met by an acceptable remedial plan. Hereafter, they are referred to as the August 15 guidelines.

On November 4, 1975, Judge DeMascio adopted a desegregation plan drafted by the Detroit Board in an effort to conform to the August 15 guidelines. 411 F.Supp. 943 (E.D. Mich. 1975). This plan provided for changes in pupil assignments in five of the eight administrative regions of the Detroit school district, excluding inner-city Regions 1, 5 and 8 which are overwhelming black. In addition, the remedial decree provided for various Educational Components, requiring establishment of certain training, remedial, testing, counseling, monitoring and public relations programs.

This court affirmed the remedial decree's Educational Components and the portion of the pupil reassignment plan that required reassignments within Regions 2, 3, 4, 6 and 7. We found that excluding Regions 1, 5 and 8 from the pupil reassignment plan left approximately 83,000 students with no relief from unconstitutional de jure segregation. Moreover, we noted, these three Regions are in the area most affected by the previously found illegal acts. This being the case, the Board had assumed the burden of showing that the segregation existing in Regions 1, 5 and 8, which were excluded from the plan, was not the result of the defendants' present or past discriminatory actions. Since the record disclosed no adequate justification for limiting the pupil reassignment plan to five Regions, we remanded the case for further consideration in regard to schools located in the inner-city Regions. 540 F.2d 229 (6th Cir. 1976).

The Supreme Court affirmed the propriety of the decree's Educational Components, and their validity no longer is an issue in this case. Neither the district court's pupil reassignment plan nor this court's partial reversal was challenged in the Supreme Court, and it had no occasion to rule thereon. 433 U.S. 267, 279 (1977) (*Milliken* II).

Before the district court commenced remand proceedings, the plaintiffs moved Judge DeMascio to recuse himself from

the case. Relying on 28 U.S.C. § 455(a) and Canon 3A(4) of the Code of Judicial Conduct, the plaintiffs complained that Judge DeMascio had created an appearance of partiality by engaging in *ex parte* contacts with experts, community groups and the Detroit Board in the process of developing his desegregation guidelines and remedial decree. Judge DeMascio declined to recuse himself. 426 F.Supp. 929 (E.D. Mich. 1977). However, he referred to the Chief Judge of the District the question whether his prior conferences with the Detroit Board and the teachers' union aimed at averting a strike, coupled with his August 28, 1975, order directing faculty reassignments, had created the appearance that he had prejudged the faculty assignment issue. On referral from the Chief Judge, District Judge James P. Churchill agreed with Judge DeMascio that recusal was not required. 426 F.Supp. at 943-44.

On the merits, Judge DeMascio reaffirmed his prior conclusion that Regions 1, 5 and 8 need not and cannot be included in the pupil reassignment plan. 460 F. Supp. 299 (E.D. Mich. 1978). He held that pronounced demographic shifts, together with the predominance of the black student population, have obliterated the effects of defendants' prior acts of de jure segregation. Current residential patterns, not school assignments, he said, account for the one-race character of the inner-city schools. Accordingly, Judge DeMascio held that the present assignment pattern is free from the vestiges of prior discrimination and that the Board had borne its heavy burden of justifying the exclusion of the inner-city regions from the pupil reassignment plan. 460 F. Supp. at 307-08.

Nevertheless, the court found there were some white students available in Region 2 to desegregate certain Region 1 schools. The Board objected that many of these white

students were Spanish dominant Hispanics involved in bilingual educational programs that would be disrupted by additional pupil reassignments. However, Judge DeMascio felt this court's opinion mandated whatever reassignments were possible, despite any burden on bilingual programs. 460 F. Supp. at 312. In a supplemental opinion, Judge DeMascio ordered the Detroit Board to develop a plan for reassigning pupils between Regions 1 and 2 which would provide for bilingual education in receiving schools. On November 11, 1978, the court adopted the Board's responsive plan. 460 F. Supp. 325 (E.D. Mich. 1978).

The Detroit Board appeals on the ground that the district court exceeded its authority by ordering additional pupil reassignments between Regions 1 and 2. The plaintiffs cross-appeal from Judge DeMascio's decision not to recuse himself, his holding that demographic changes have obliterated the effects of defendants' prior discriminatory acts, and his conclusion that Region 1, 5 and 8 were properly excluded from the pupil reassignment plan. This court stayed implementation of the additional reassignment plan pending the outcome of this appeal.

II

The first question we address is whether Judge DeMascio was correct when he decided that demographic changes and the growth of the Detroit school system's proportion of black students have obliterated the effects of defendants' past discriminatory actions. We conclude that this holding of the district court is refuted overwhelmingly by the record.

Judge DeMascio's conclusion apparently was based on his belief that the only effect of defendants' past discrim-

inatory actions was to allow white students to escape from integrated schools in racially changing residential areas:

> This was so because the actions which formed the basis for Judge Roth's liability findings were basically reactions by the Detroit Board of Education to changing residential patterns. The optional and gerrymandered attendance zones served the purpose of keeping white students out of schools that, in the absence of such polices, would have become, and in fact have become, integrated naturally. Judge Roth did not find, however, that these policies in turn created additional residential segregation which in turn created additional school segregation. Had he made such findings, and had such findings been supported in the record, we assume the Supreme Court would have affirmed the propriety of an interdistrict remedy.
> 460 F. Supp. at 307-08.

Accordingly, Judge DeMascio thought the defendants' actions could have had only temporary segregative effects, effects that have been nullified by the almost total displacement of whites from formerly integrated neighborhoods:

> These pronounced demographic shifts, first predicted by Judge Roth, and the predominance of the black student population have obliterated the optional and gerrymandered attendance zones which permitted white students to avoid attending integrated schools, the practice of bussing black students from overcrowded schools beyond a closer white school and the practice of altering feeder patterns in racially changing neighborhoods.
> (Footnote omitted.) 460 F. Supp. at 307.

The problem with this conclusion of the district court is that it is contrary to the law of this case as established by Judge Roth and affirmed by this court and by the Supreme Court in *Milliken* I.

Judge Roth found that the Detroit Board had done at least four things to maintain a dual school system in Detroit: First, during the 1950's, the Board "created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions." 338 F. Supp. at 587. "The natural, probable, foreseeable and actual effects of these optional zones was to allow white youngsters to escape identifiably 'black' schools." *Id.* Second, the Board "admittedly bused black pupils past or away from closer white schools with space available to black schools," but only in one instance, necessitated by the burning of a white school, did the Board bus white children to a black school. 338 F.Supp. at 588. Third, the Board "created and altered attendance zones, . . . grade structures and . . . feeder school patterns in a manner which . . . [maintained] black and white pupils in racially segregated schools." *Id.* Finally, by constructing many small schools and locating new schools in areas of one race, the Board negated opportunities to integrate, contained the black population, and compounded school segregation. *Id.*

The plaintiffs presented evidence that the Board's discriminatory actions affected not only schools but residential patterns. For example, in affirming Judge Roth's finding of de jure segregation, this court quoted the following exchange between plaintiffs' counsel and Dr. Gordon Foster of the University of Miami, director of the Florida School Desegregation Consulting Center, concerning optional attendance zones:

> "Q. Doctor Foster, from your examination of the 1950 census and in turn the 1960 census exhibits, do

you have an opinion as to the effect of such an optional zone on the community residence pattern in the community?

* * *

"A. Community people and residents in a situation such as this generally have a perception that there is something wrong with their school, that the whites need an optional zone to get out into a less black situation and, therefore, this increases their perception of racial isolation and, in fact, physical containment.

"Q. Does this have an effect, Doctor, in terms of the residence pattern? I believe you testified in 1950 the optional area was entirely white to zero to 4.9 per cent white.

* * *

"A. In my opinion this tends to increase the instability of the community because they generally feel this is an ad hoc temporary interim situation and it increases white flight in this sort of situation.
484 F.2d at 234.

At another point, Dr. Foster testified that locating new schools in one race areas rather than integrated areas tends to isolate the new school's attendance zone and perpetuate its racial identity. 484 F.2d at 238.

Responding to this and other evidence, Judge Roth found the Board's discriminatory policies were partially responsible for segregated residential patterns:

> Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.
>
> . . . [A]ll of them, including the school authorities, are, in part, responsible for the segregated condition

> which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corrseponding effect on the residential pattern by the racial composition of the schools.
> 338 F. Supp. at 587.

See also Judge Roth's seventh conclusion of law, 338 F. Supp. at 593.

In affirming Judge Roth's findings on the issue of segregation, we stated:

> This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except *as school construction programs helped cause or maintain such segregation.*
> 484 F.2d at 242 (emphasis supplied).

See also Millikin I, *supra,* 418 U.S. at 724 and 728 n.7 (acknowledging Judge Roth's and this court's partial reliance on de jure school segregation as one cause of residential segregation).

Moreover, Judge Roth's conclusion that present Detroit housing patterns reflect the Board's past discrimination accords with the analysis of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 20-21 (1971):

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and ca-

pacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

See also Adams v. United States, — F.2d —, slip op. at 34 (8th Cir. Mar. 3, 1980) (massive demographic shifts that have rendered the St. Louis school district 75 per cent black

have incorporated rather than wiped out the segregative effects of the system's prior de jure discriminatory policies: "public perception of the racial identity of a school can be, and often is, a powerful factor in shaping the residential patterns of a neighborhood").

In *Keyes v. School District No. 1,* 413 U.S. 189 (1933), the Supreme Court held that the discriminatory practices of a school district may have the effect of earmarking a school according to its racial composition, and this, in turn, may have a profound reciprocal effect on the racial composition of residential neighborhoods. The Court said:

> "[T]he practice of building a school . . . to a certain size and in a certain location 'with conscious knowledge that it would be a segregated school,' . . . has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools."
> 413 U.S. at 201-02.

The clear import of Judge Roth's holding is that the defendants' discriminatory policies helped to drive whites from the Detroit school district and to contain blacks in an ever-expanding core area of the city. Viewed in this light, Judge DeMascio's holding, urged by the Board before this court, is that the segregative effects of the defendants' discriminatory policies have been obliterated by the very demo-

graphic changes those policies helped to produce. We conclude that this argument refutes itself.

It is the law of this case that the unconstitutional actions of defendants, both local and State, contributed to the segregated residential patterns and the one race schools that now exist in Detroit. Judge Roth found that de jure school segregation encouraged whites to flee from racially changing neighborhoods and ultimately from the Detroit school district. That finding is supported by substantial record evidence and ample legal precedent. This being so, we reverse Judge DeMascio's holding that population changes have obliterated the effects of the Board's past discrimination. This holding is contrary to the law of this case and, treated as a finding of fact, is clearly erroneous. On the contrary, the record demonstrates that these population changes themselves are in part vestiges of past discrimination.

III

We turn our attention next to the holding of the district court that the overwhelming percentage of black students in the school district as a whole and particularly in the inner-city regions, coupled with the small number of white students even theoretically available for reassignment, foreclose the possibility of including any schools located in Regions 1, 5 and 8 in the pupil reassignment plan. We find this holding constitutionally insupportable.

The last time this case was before us, we reversed the exclusion by the district court of the inner-city regions from the pupil reassignment plan. We recognized then that "the overwhelming number of black students in Detroit and their concentration in the inner-city undoubtedly makes some one-race schools unavoidable under any 'Detroit only' remedy."

540 F.2d at 237. However, in order to justify eliminating the inner-city regions entirely, we said, the Board would have to show the resultant all black schools are not the product of past discrimination. This would be particularly difficult, we warned, because these very regions were the ones hardest hit by past acts of de jure segregation. 540 F.2d at 238. "We cannot hold," we concluded, "that where unconstitutional segregation has been found, a plan can be permitted to stand which fails to deal with the three regions where the majority of the most identifiably black schools are located." 540 F.2d at 240.

On remand, the Detroit Board attempted to justify its exclusion of Regions 1, 5 and 8 by presenting evidence that the shift from white to black in the district had accelerated well beyond former demographic predictions and made inner-city desegregation impossible. The Board's figures established that the percentage of black students in the district is increasing despite a decline in the total enrollment. Of the children who enter Detroit kindergartens, a greater proportion of blacks than whites remain in the system throughout their school years. Mr. Hendrickson, the Board's expert, projected the district's enrollment would be 91.8% black by 1981. Moreover, the district court found, residential areas near the school district's fringe are becoming increasingly black as inner-city families replace whites who leave the district entirely. 460 F. Supp. at 305-07.

Judge DeMascio felt the Board's evidence established that no more desegregation of Regions 1, 5 and 8 is possible. 460 F. Supp. at 307. He concluded that integrating the inner-city schools would require the Board to scatter the remaining white students to such an extent that there would be no meaningful interaction between the races in any school. The

result would be mere token integration of the inner-city schools achieved at the cost of disrupting previously approved assignment patterns that effectively desegregate the schools in other regions.

To illustrate the futility of attempting to include the inner-city regions, Judge DeMascio turned to statistics. Pointing out that the district court had repeatedly rejected the notion of making all schools identifiably black, Judge DeMascio held that only the excess of non-black over black students in any given school could be considered available for reassignment to schools in Regions 1, 5 and 8. The Board's evidence showed there were 31 majority white elementary schools in the district with 3397 students available for reassignment. Six middle schools had 733 students available and one high school had 175. However, the Board's evidence also showed the black enrollment in inner-city elementary schools was 38,259 or 11 times the number of whites available for reassignment. The comparable figures for inner-city middle and high schools were 17,015 and 17,783, or 23 times and 100 times the respective numbers of white students available for reassignment. 460 F.Supp. at 310. Accordingly, the court found, to disperse these few available white children among the schools in Regions 1, 5 and 8 would accomplish nothing more than token integration, a result this court had previously rejected. 460 F.Supp. at 310, citing 540 F.2d at 239.

The flaw in the district court's logic was its assumption that Regions 1, 5 and 8 must be treated as units, and that integrating schools in these Regions must be an all-or-nothing proposition. Form the outset of this litigation's post-*Milliken I* remedial phase, Judge DeMascio seems to have assumed that the inner-city regions must be treated in isolation from the rest of the district. *See, e.g.*, 402 F. Supp. at

1129 (holding that the negligible benefits of including the inner-city do not justify "the extraordinary remedy of such cross-regional bussing"). Yet it was exactly this unitary treatment of Regions 1, 5 and 8 that led us to reverse and remand the last time this case was before us. Citing *Davis v. Board of Commissioners of Mobile County,* 402 U.S. 33, 38 (1971), in which the Supreme Court refused to permit isolated treatment of one part of metropolitan Mobile, we found it "equally unacceptable to treat Regions 1, 5 and 8 in isolation from the rest of the Detroit school system." 540 F.2d at 238.

We see no reason to treat the borders of the Detroit school system's inner-city administration regions as sacrosanct. In the first place, Detroit's regional scheme of school administration originated with Act No. 48, Public Laws of 1970, the same law whose §12 we found to be an unconstitutional interference with the Board's attempts to desegregate Detroit high schools. Were we to view the Act's remaining provisions as creating barriers to constitutionally required desegregation, we would have to hold them unconstitutional also. *United States v. Scotland Neck Board of Education,* 407 U.S. 484, 489 (1972); *Wright v. Council of the City of Emporia,* 407 U.S. 451, 461-62 (1972). Furthermore, there is nothing in the Supreme Court's holding in *Milliken* I, *supra,* 418 U.S. at 745-46, that renders inviolable the lines of Administrative Regions within the Detroit School District. Judge Roth's ruling that the Detroit Board carried out a systematic program of segregation established a predicate for finding a dual school system in all the regions. *See Keyes v. School District No. 1, Denver Colo.,* 413 U.S. 189, 201 (1973). In such a situation, a district court may disregard the boundaries of administrative regions in order

to vindicate constitutional rights. *Milliken* I, *supra,* 418 U.S. at 745.[2]

The district court erred when it held that Regions 1, 5 and 8 must be excluded in their entirety from the pupil reassignment plan. The proper inquiry after this court's last remand was not whether there are enough white students available to desegregate *every* inner-city school. This court has recognized from the first that some one race schools are unavoidable under a Detroit-only plan. *See* 540 F.2d at 237; 484 F.2d at 249. It, therefore, is irrelevant that there are 11 times as many black students in all the inner-city elementary schools combined as there are white students available for reassignment. What is crucial is whether those 3,397 white students can practically be reassigned to achieve effective levels of desegregation in *some* of the inner-city schools. That, and the analogous questions concerning the middle and high schools, are the issues the district court should have addressed and is directed to address on remand from this decision. The small number of white students available for reassignment and the problems involved in transporting them may justify excluding some, and perhaps many, inner-city schools from the pupil reassignment plan. We emphasize that the need to cross regional lines does not justify such exclusion.[3]

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2. In fact, Judge DeMascio's remedial guidelines specified that, when the Board attempted rezoning to achieve integration in other regions without transporting students, "regional lines need not be respected; when the choice is between preserving regional lines and bussing, regional lines must give way." 402 F.Supp. at 1134.

3. The decision of the district court to treat the inner-city regions as units and to exclude them entirely from the reassignment plan distinguishes this case from *Calhoun v. Cook,* 522 F.2d 717 (5th Cir. 1975), *rehearing denied,* 525 F.2d 1203 (1975). The *Calhoun* court refused, in light of Atlanta's 85 per cent black student population, to order further pupil reassignments even though 92 of the system's 148 schools were over 90 per cent black. However,

On remand, the district court should apply substantially its August 15, 1977, remedial guidelines, 502 F.Supp. 1096, 1134, *supra,* but without regard to the boundary lines of administrative regions. White students should be considered available for reassignment only to the extent exchanging them with pupils from inner-city schools will not render formerly integrated schools identifiably (more than 55 per cent) black. Where practicable, attendance zones should be redrawn across regional lines to include inner-city pupils in integrated schools. Where rezoning is impossible, as we anticipate it will be in most instances, schools with white students available for reassignment should be paired with the closest feasible inner-city school. In order to achieve effective levels of desegregation, it may be necessary to pair several white schools with a single black school. Such pairing should be done with a view toward minimizing the amount of transportation required. In some situations, it may be that the small number of white students available for reassignment from a particular school, coupled with the distance they would have to be transported to reach an inner-city school that can be paired with other white schools, will justify maintaining present assignment patterns.

We emphasize that this remand is not intended to disrupt previously approved assignment patterns. As we said the last time this case was before us, "the steps which [the district court] has taken thus far appear to us to be consistent with the fourteenth amendment." 540 F.2d at 240. The district court's error was its failure to apply its reme-

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there is no indication those 92 identifiably black schools were concentrated in one or several administrative regions left wholly untouched by the pupil reassignment plan. Moreover, if we were convinced that the Fifth Circuit permitted Atlanta's desegregation plan to be limited by intra-district administrative lines, we would be forced to disagree with its decision.

dial guidelines to schools in all the regions. Doing so may well achieve at least some additional desegregation, and it is for this purpose that we are remanding.

Nor are our remand instructions intended to be a straight jacket on the district court. We recognize that the district court must balance a variety of individual and collective interests in an effort to arrive at "a plan that promises realistically to work . . . *now*." *Green v. County School Board,* 391 U.S. 430, 439 (1968). Flexibility is essential to that end.

Our last opinion in this case mirrored our frustration at our inability to chart a course that would guide the district court to desegregate the entire school district:

> We recognize that it would be appropriate for us at this point to supply guidelines to the District Judge as to what he should do under this remand. Omission of such guidelines is not based on any failure to consider the problem in depth. It is based upon the conviction which this court had at the time of its en banc opinion in this case—and for the reasons carefully spelled out therein—that genuine constitutional desegregation can not be accomplished within the school district boundaries of the Detroit School District.
> 540 F.2d at 240.

The district court, however, apparently interpreted the above-quoted comment as a recognition by this court that effective pupil reassignments cannot be achieved in *any* of the schools in the three inner-city regions. *See* 460 F.Supp. at 304. Our comment was not so intended and should not be so read. Although genuine constitutional desegregation may be impossible within the Detroit district, this court has the obligation to see that all practicable steps are taken to remedy the unconstitutional segregation that has been found to exist. To that end, the district court's exclusion of

all schools in Regions 1, 5 and 8 from the pupil reassignment plan is reversed and the cause remanded for further consideration in light of this opinion.

IV

Despite his conclusion that "no more desegregation is feasible in Regions 1, 5 and 8 collectively," 460 F.Supp. at 307, Judge DeMascio determined there are white students in Region 2 available for reassignment to Region 1 schools. 460 F.Supp. at 311-12. Accordingly, he ordered the Detroit Board to prepare a supplemental pupil reassignment plan. The Board argues the district court exceeded its authority by requiring further reassignments. We reject that argument. However, we vacate the court's order and remand the case for a hearing on the question whether Hispanic students should be treated as white for desegregation purposes.

The district court found Region 2 is unique among Detroit's administrative regions in that it has not experienced much growth since 1974 in the percentage of its students who are black. Indeed, the court found, some Region 2 schools had fewer black students in 1977 than in 1974. 460 F.Supp. at 311. Over all, black students accounted for only 62% of the Region's 1977 enrollment. Furthermore, fourteen elementary schools in Region 2 had a total of 2145 white students available for reassignment. Thus, the court concluded, numbers alone pose no obstacle to reassigning Region 2 whites to Region 1 schools. *Id.*

Judge DeMascio apparently felt the concentration in Region 2 of programs of bilingual education for Spanish dominant children accounted for the relatively slow growth of the black enrollment in that Region. We agree with the plaintiffs that restricting bilingual programs to one region

provides Hispanic families not only with neighborhood schools but with an incentive to concentrate in that region. This artificial concentration of Hispanic whites, the district court found, in turn prevents the natural influx of black families and so contributes to resegregation of Region 2. 460 F.Supp. at 312. To counteract this resegregative trend and to comply with the mandate of this court that inner-city schools be desegregated, the district court ordered the Board to develop a plan for reassigning pupils between schools in Regions 1 and 2.

The Detroit Board advances three reasons the district court's order should be overturned. First, the Board says, the Detroit school system is now unitary and the district court had no authority to order further reassignments. Second, even if the system is not yet unitary, reassigning Spanish-dominant students to Region 1 schools will disrupt State required bilingual educational programs while achieving only token integration. Third, the Board says, Hispanic students cannot be treated as white for desegregation purposes. We deal with these arguments seriatim.

The Board's first argument depends on Judge DeMascio's holdings that "the school district no longer discriminates against black students," and that "its present assignment pattern is free from the vestiges of prior discrimination." 460 F.Supp. at 308. The case is therefore controlled by *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976), the Board says. *Pasadena* held a district court has no authority to order annual readjustments of attendance zones to compensate for demographic changes that occur after a racially neutral attendance pattern has been achieved. Since its assignment plan is racially neutral, the Board says, the district court had no authority to order further modification.

The short answer to this argument is that a racially neutral assignment plan does not necessarily achieve a racially neutral attendance pattern. The Board's plan is limited by residential patterns which reflect past discrimination, as well as by district lines and transportation problems. As the Supreme Court recognized in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 28:

> The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. * * *
>
> In short, an assignment plan is not acceptable simply because it appears to be neutral.

There are now 66,650 students attending schools in Regions 1, 5 and 8. The remedial measures implemented to date afford none of these studnets any relief from de jure segregation. Detroit is still far from achieving a racially neutral attendance pattern. This is not a *Pasadena* situation.[4] *See Adams v. United States, supra,* ..... F.2d ....., slip op. at 36 (the failure of the St. Louis Board ever to adopt a desegregation plan to compensate for segregated residential patterns makes *Pasadena* inapplicable).

The Board's second argument is that reassigning Spanish-dominant students to Region 1 schools will disrupt bilingual

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4. In light of our holding that Detroit has not yet achieved a unitary system, we need not decide whether the concentration of bilingual programs in Region 2 is having a resegregative effect and, if so, whether that fact standing alone would empower the district court to order additional relief. *See Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977) (Dayton I); *Washington v. Davis,* 426 U.S. 229 (1976).

educational programs while achieving only token integration. Dr. Felix Valbuena, the Director of Bilingual Education for the Detroit school district, testified that reassigning Spanish speaking students currently enrolled in Region 2 bilingual programs would impede the Board's ability to develop a model program and train bilingual teachers; produce fear and anxiety for the students; limit community participation and interest in the schools; produce shortages of qualified bilingual teachers and necessary resource materials; and require the Board to adopt less efficient and effective methods of instruction. In return for this disruption, the Board says, only 1600 students will be reassigned, achieving token integration of only five of the thirty-one Region 1 schools.

The Board's concern for the continued viability of its bilingual educational programs is commendable. Circumstances permitting, we might well agree that the desegregative benefits would not justify the disruption created by reassigning Spanish dominant students. Circumstances, however, do not so permit. We agree with the district court that when the choice is between maintaining optimal conditions in a bilingual educational program and desegregating all-black schools, desegregation must prevail. 460 F.Supp. at 312. *See Keyes v. Denver School District No. 1,* 521 F.2d 465, 480 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

This brings us to the Board's third argument, that Hispanic students cannot be reassigned to desegregate identifiably black schools because such students are themselves minorities. In support of this argument, the Board cites *Keyes v. School District No. 1, Denver, Colo., supra,* 413 U.S. 189 (1973).

In the *Keyes* case, the Supreme Court found the school district's history of discrimination against Hispanic stu-

dents justified treating those students as minorities for desegregation purposes:

> We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. * * * Indeed, the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination," 313 F.Supp., at 69. This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.
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> (Citations and footnotes omitted.) 413 U.S. at 197-98.

Similarly, the Fifth Circuit has treated Hispanic students as minorities for purposes of school desegregation. *See United States v. Midland Independent School District,* 519 F.2d 60, 63-64 (5th Cir. 1975), *cert. denied,* 424 U.S. 910 (1976); *Tasby v. Estes,* 517 F.2d 92, 106-07 (5th Cir.), *cert. denied,* 423 U.S. 939 (1975) and cases cited therein.

The common element justifying treatment of Hispanic students as minorities in the *Keyes, Midland,* and *Tasby* cases was each school system's history of de jure segregation of Hispanos. In *Keyes,* the Supreme Court found "Negroes and Hispanos in Denver suffer identical discrimination." 413 U.S. at 198. In the *Midland* case, "the record clearly demonstrate[d] that the Midland School District deliberately segregated Mexican-Americans from Anglos." 519 F.2d at 62. The *Tasby* court found record evidence "to establish the isolation of Mexican-American students in the [Dallas school system] and the [Dallas system's] practice of 'integrating' its Mexican-American students with black students." 517 F.2d at 106. Thus, it appears, in school systems that historically have discriminated against Hispanic students, those students must be grouped with blacks rather than whites for desegregation purposes.

Because there is no indication in the record whether, historically, the Detroit school district has discriminated against Hispanic students, we are unable, on the present appeal, to affirm Judge DeMascio's decision that "for school assignment purposes Spanish-surnamed students cannot be treated differently than other white students." 460 F.Supp. at 312. On remand, the district court is directed to conduct a hearing on that issue.

Our remand for a hearing on this issue places the case in an unusual posture. In order for the Board to prevail in its contention that Hispanic students cannot be treated as white, it must prove it practiced de jure segregation of such students. However, doing so would compound the Board's problems because grouping Hispanos with blacks might require revision of the district court's remedial guidelines and a comprehensive review of previously approved assignment patterns, at least in Region 2. This being so, it is

possible that the Board may not continue to assert its present position on remand.

Nor is any other party to the present litigation likely to argue there has been de jure segregation of Hispanic students. The position of plaintiffs in the district court was that concentrating bilingual programs in Region 2 provides neighborhood schools which in turn induce Hispanic families to move there. 460 F.Supp. at 312. The plaintiffs urged that this resegregative effect should be countered by reassigning some Hispanic students to Region 1 schools. Treating Hispanos as blacks for desegregation purposes would, of course, preclude such reassignments since the district court consistently has refused to reassign blacks to indentifiably black schools. Thus, the plaintiffs have no incentive to argue Hispanos have been the victims of de jure segregation in Detroit. Simarily, the State of Michigan defendants, who may well have to share the Board's liability for remedial costs if the court finds de jure segregation of Hispanic students, seem unlikely to present evidence of discrimination.

Because none of the existing parties is likely to argue that Hispanic students have been victims of de jure segregation in Detroit, the district court is directed to permit individuals or organizations representing Detroit's Hispanic community to intervene in the remand proceedings for the limited purpose of presenting evidence on this issue. Our opinion in the related case, No. 78-1598, —F.2d — (6th Cir. 1980), recognizes the right of LULAC Council No. 11054, and its co-appellants to intervene in these remand proceedings solely on the issue of de jure segregation of Hispanos. Should other individuals or organizations also wish to intervene on behalf of the Hispanic community, the district court will determine under Fed. R. Civ. P. 24 whether their interests are adequately represented by

LULAC Council No. 11054 et al.; additional intervenors need not be permitted unless their participation as parties will serve some useful purpose. We emphasize here, as in our opinion in No. 78-1598, that intervention will be limited to the issue of de jure segregation of Hispanic students in the Detroit school system.

Unless the district court finds the defendants discriminated against Hispanic students, it may treat such students as white for desegregation purposes. The court then would be free to order implementation of its previously approved reassignment plan for Hispanic students, or any modification thereof found to be desirable. We suggest, however, that the district court permit LULAC Council No. 11054 et al. to participate as amici curiae in developing a reassignment plan that will achieve the maximum amount of desegregation possible without neglecting the bilingual educational needs of Hispanic students. Before any additional reassignments are implemented, including those contained in the previously approved plan of the district court for transporting Region 2 students to Region 1, they should be tested against the August 15, 1975, guidelines as modified by Part III of this opinion.

Accordingly, the district court's order directing the Board to implement additional pupil reassignments in Regions 1 and 2 is vacated. The cause is remanded for a hearing on the question whether Hispanic students should be treated as white for desegregation purposes and for other action consistent with the outcome of that hearing.

V

The final question we must address is whether Judge DeMascio erred in declining to recuse himself from the remand proceedings in this case. We hold he did not err.

Briefly, the plaintiffs argue Judge DeMascio violated 28 U.S.C. § 455(a) and Canon 3A(4) of the Code of Judicial Conduct by engaging in various *ex parte* contacts and discussions with court-appointed experts, community groups and representatives of the Detroit Board. In an opinion reported at 426 F.Supp. 929 (E.D. Mich. 1977), Judge DeMascio denied plaintiffs' motion for recusal.

28 U.S.C. § 455(a), as amended,[5] provides:

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5. Section 455 was amended by the Act of December 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. Section 1 of that Act substituted the present subsection (a) for the former version which read:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

There is agreement among the courts that the purpose of the amendment was to change the standard for recusal from a subjective to an objective one, as well as to overrule the prior concept that close cases involving disqualification should be resolved against recusal on the ground the judge has a duty to sit. *See e.g., United States v. Cowden,* 545 F.2d 257 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977); *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

There is a split among the circuits, however, as to whether the amended version of § 455(a), with its objective standard, applies to post amendment proceedings in cases, such as this one, filed before the amendment's effective date. Section 3 of the amending act provided the amended version "shall not apply to the trial of any proceeding commenced prior to [Dec. 5, 1974] nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to [that date]." The Fourth and Eighth Circuits have held the amended version inapplicable to post amendment proceedings in cases filed before December 5, 1974. *In re Virginia Electric & Power Co.,* 539 F.2d 357 (4th Cir. 1976); *United States v. Dodge,* 538 F.2d 770 (8th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977). The Fifth Circuit has disagreed. *Potashnick v. Port City Construction Co.,* ..... F.2d ....., 48 U.S.L.W. 2490 (5th Cir. Jan. 15, 1980); *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1977). Judge DeMascio held the amended version of § 455(a) inapplicable in the present case. 426 F.Supp. at 932.

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The plaintiffs complain that Judge DeMascio created the appearance of partiality by meeting *ex parte* with the Detroit Board's representatives on August 15, 1975, even before plaintiffs' counsel had received a copy of the court's just filed remedial guidelines, to discuss an impending teachers' strike. The plaintiffs also argue Judge DeMascio engaged in what they term "negotiations" with the Board in developing a desegregation plan, a process from which they were excluded.

Judge DeMascio's opinion denying recusal discusses these complaints and his underlying actions in detail, and we need not recount them here. *See* 426 F.Supp. at 935-39. He characterized the incidents of which plaintiffs complain as "judicial activities designed to ensure a community climate receptive to the court's orders." 426 F.Supp. at 939. The so-called negotiation process was designed "to avoid the formality of an order," he said. *Id.* Concluding that his actions were "well within [his] discretion and based on substantial precedent." Judge DeMascio held § 455(a) did not require recusal. *Id.*

We agree. Although perhaps a bit unorthodox, Judge DeMascio's actions appear to us to have been judicial activities. To make out a case for recusal under § 455(a), a movant must rely on extra-judicial conduct rather than

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Because we think the actions of Judge DeMascio do not require recusal even under the section as amended, we need not decide which version applies to this case. Rather, we assume for purposes of this decision that the amended version of the statute applies.

matters arising in a judicial context. *Davis v. Board of School Commissioners of Mobile County, supra,* 517 F.2d at 1052 (construing amended § 455(a) *in pari materia* with 28 U.S.C. § 144, the other federal disqualification statute). *See United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966); *Berger v. United States,* 255 U.S. 21, 31 (1921). Accordingly, we affirm Judge DeMascio's decision that recusal was not required.

The plaintiffs also complain that Judge DeMascio's conduct violated Canon 3A(4) of the Code of Judicial Conduct:

> (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex-parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

In addition to his previously described meeting with Board representatives and "negotiations" over the Board's proposed desegregation plans, the plaintiffs argue, Judge DeMascio's use of experts violated Canon 3A(4). By order of April 15, 1975, Judge DeMascio appointed three educators as experts to assist him in gathering background information, soliciting the views of community groups and educators, and evaluating the Educational Components of the Board's remedial plan. The plaintiffs do not question the court's authority to utilize experts. Rather, they complain the court's experts did not file reports of record and

were never subject to cross-examination, but submitted their views *ex parte*.

We do not believe Judge DeMascio's use of experts, or his receipt through them of community and expert views on how best to approach the problems of desegregating Detroit schools, required recusal. We are concerned with the plaintiffs' charge that the reports of these experts were not placed in the record nor made available to the parties. Accordingly, we expressly direct that if any experts are employed to advise the district court of any further matters in this litigation, they shall prepare written reports, copies of which shall become part of the record and shall be made available to all parties or their attorneys.

The remedial phase of this litigation has been protracted and arduous. We recognized in a previous opinion that "District Judge DeMascio was faced with an extremely difficult (if not impossible) assignment, confronted as he was with the responsibility of formulating a decree which would eliminate the unconstitutional segregation found to exist in the Detroit public schools, without transgressing the limits established by the Supreme Court." 540 F.2d at 236. Our review of Judge DeMascio's various opinions and orders inclines us not to disagree with District Judge James P. Churchill's assessment[6] of Judge DeMascio's conduct in these remedial proceedings:

> It is my opinion that the manner in which Judge Robert E. DeMascio has presided in this case has been exemplary and should command the respect of the parties, counsel, the judiciary, and the public.
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> 426 F.Supp. at 944.

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6. Judge Churchill's comment is taken from his opinion holding, on a question referred to him by the Chief Judge of the district, that Judge DeMascio's conduct had not created the appearance of partiality and so did not require recusal in regard to faculty assignments.

However, in view of the public interest in the instant school desegregation case, the challenge raised by the plaintiffs, and the bitter feelings that have developed, this court suggests that, on remand, the Chief Judge of the District Court for the Eastern District of Michigan reassign this case either to himself or to another appropriate judge.

VI

It was indicated during oral argument that plaintiffs intend to proceed with their efforts to establish, within the guidelines enunciated by the Supreme Court in *Milliken v. Bradley,* 418 U.S. 717, 744-47 (1974) (*Milliken* I), a basis for a metropolitan remedy. *See* 540 F.2d at 240; 411 F. Supp. at 937. Our limited affirmances in *Bradley v. Milliken,* 540 F.2d 229 (6th Cir. 1976) and the present appeal are without prejudice to the district court's obligation to proceed with the interdistrict litigation, if pursued by the plaintiffs.

On remand, the district court will be empowered to make further alterations in its previously approved remedial plans, as the evidence may require.

The case is remanded to the district court for further proceedings not inconsistent with this opinion and our previous opinion reported at 540 F.2d 229. No costs are taxed. Each party will bear its own costs on this appeal.